

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RODERICK LAMAR HYMON,)

Petitioner,)

vs.)

BRIAN WILLIAMS, *et al.*,)

Respondents.)

2:09-cv-1324-RCJ-RJJ
ORDER

This is an action on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner Roderick Hymon, a Nevada prisoner. Before the court is respondents' Motion to Dismiss (docket #9) and petitioner's Opposition (docket #13).

I. Background and Procedural History

Petitioner was sentenced on April 3, 2003, in a Nevada court to two concurrent and one consecutive terms of ten years to life on convictions for Robbery with the Use of a Deadly Weapon, Larceny from the Person and Assault with a Deadly Weapon. Exhibit A.¹ Petitioner filed a state post-conviction petition on October 21, 2008, challenging the computation of the time he had served pursuant to his judgment of conviction and alleging violations of his due process and equal protection rights. Exhibit B. The state opposed the petition. Exhibit C. On January 2, 2009, the state district court denied the petition and petitioner timely appealed. Exhibits D. The Nevada Supreme Court affirmed the state

¹ The exhibits referenced in this Order were submitted by respondents in support of the Motion to Dismiss and are found in the court's docket at 10.

1 district courts decision on July 21, 2009. Exhibit E.

2 Petitioner submitted his federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254
 3 on July 21, 2009 and it was filed on September 18, 2009 after the administrative matters were resolved.
 4 Docket #4. Petitioner claims a due process violation for an alleged miscalculation of his good time
 5 credits. *Id.* Respondents now move to dismiss the petition on the grounds the petitioner does not attack
 6 the validity of his conviction or sentence and fails to raise a federal constitutional question and is not
 7 subject to review by this court (docket #9).

8 **II. Federal Habeas Corpus Standards**

9 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides the legal standard for
 10 the Court's consideration of a state criminal conviction on a petition for writ of habeas corpus:

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 12 An application for a writ of habeas corpus on behalf of a person in
 13 custody pursuant to the judgment of a State court shall not be granted
 14 with respect to any claim that was adjudicated on the merits in State court
 15 proceedings unless the adjudication of the claim—

16 (1) resulted in a decision that was contrary to, or involved an
 17 unreasonable application of, clearly established Federal law, as
 18 determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable
 determination of the facts in light of the evidence presented in the State
 court proceeding.

19 28 U.S.C. §2254(d).

20 The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in
 21 order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the
 22 extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

23 Ground One

24 In Ground One, petitioner claims a violation of the Fourteenth Amendment of the Constitution
 25 based on a recent change in Nevada law which changes the amount of good time credit an inmate is
 26

1 entitled to received under certain circumstances. Petitioner is actually challenging the interpretation and
2 application of a Nevada statute as it has been applied to his sentence.

3 Although a prisoner has no constitutional right to be conditionally released before the expiration
4 of a valid sentence, state early release statutes can create a liberty interest protected by Fourteenth
5 Amendment due process guarantees. *See Greenholtz v. Inmates of the Neb. Penal & Correctional*
6 *Complex*, 442 U.S. 1, 7 (1979). State statutes that combine mandatory language, such as “shall” and
7 “must,” with substantive predicates create a protected liberty interest. *Hewitt v. Helms*, 459 U.S. 460,
8 471-72 (1983).

9 The statute at issue here NRS 209.4465 provides for a mandatory award of good time credits,
10 so long as the inmate meets certain requirements. However, the interpretation of that law and its
11 application are the purview of the Nevada Supreme Court. *See, Estelle v. McGuire*, 502 U.S. 62, 67-68
12 (1991); *Oxborrow v. Eikenberry*, 877 F.2d 1395 (9th Cir. 1989) (deference to state court only suspended
13 if that court’s interpretation is “untenable or amounts to a subterfuge to avoid federal review of a
14 constitutional violation”).

15 Here, the Nevada Supreme Court determined that petitioner’s sentence has been properly
16 calculated based upon the statutes limited retroactive application and the specific crimes for which he
17 was convicted. The Court said:

18 These amendments to NRS 209.4465 had a very limited retroactive effect –
19 only the provision relating to application of statutory good time credits to a
20 minimum term for purposes of parole eligibility had any retroactive effect,
21 and this retroactive benefit applied only to certain offenders. 2007 Nev. Stat.,
22 ch. 525 § 21, at 3196; NRS 209.4465(8)(d). An offender convicted of a
23 Category A felony was entitled to receive 20 days of statutory good time
credits beginning July 1, 2007, and those credits must be deducted from the
maximum term to be served and would apply to eligibility for parole unless
the offender was sentenced pursuant to a statute specifying a minimum terms.
NRS 209.4465(1), (7), (8); *see also* 2007 Nev. Stat., ch. 525 § 21 at 3196.

24 The credit history report provided in the record on appeal indicates
25 that statutory credits were correctly applied. Appellant was convicted of a
26 Category A felony, habitual criminal adjudication pursuant to NRS
207.010(1)(b), and thus, he was not entitled to any retroactive application of
the 2007 amendatory provisions of NRS 209.4465. Appellant failed to

1 demonstrate a violation of any constitutional rights. Therefore, we affirm the
2 order of the district court.

3 Exhibit E. Petitioner's argument to the contrary, the state court's interpretation of this state statute is
4 not untenable and is, in fact, supported by the legislative history as cited. Petitioner has not
5 demonstrated that the interpretation is an effort at subterfuge to avoid federal review. The petition must
6 be dismissed, as it fails to present a federal constitutional issue which this court may review.

7 **III. Certificate of Appealability**

8 In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28
9 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th
10 Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
11 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
12 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).
13 "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the
14 constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this
15 threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among
16 jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to
17 deserve encouragement to proceed further. *Id.*

18 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section 2254
19 and 2255 Cases, district courts are required to rule on the certificate of appealability in the order
20 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal
21 and request for certificate of appealability to be filed. Rule 11(a). This Court has considered the issues
22 raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of
23 appealability, and determines that none meet that standard. The Court will therefore deny petitioner a
24 certificate of appealability.

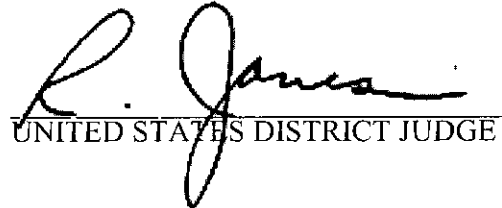
25 **IT IS THEREFORE ORDERED** that the Motion to Dismiss (docket #9) is **GRANTED**.

26 The petition is **DISMISSED WITH PREJUDICE**.

1 IT IS THEREFORE ORDERED that the Clerk shall ENTER JUDGMENT
2 ACCORDINGLY.

3 IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED.

4 Dated this 21st day of April, 2010.

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7 UNITED STATES DISTRICT JUDGE
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